

ILLINOIS POLLUTION CONTROL BOARD

January 18, 2001

ROGER STONE,)
)
 Petitioner,)
)
 v.) PCB 01-68
) (Permit Appeal – NPDES)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY and NAPERVILLE)
 PARK DISTRICT,)
)
 Respondents.)

ORDER OF THE BOARD (by G.T. Girard):

On October 18, 2000, Roger Stone filed a petition to contest the issuance of a National Pollutant Discharge Elimination System (NPDES) permit pursuant to Section 40(e) of the Environmental Protection Act (Act) (415 ILCS 5/40(e) (1998)). The permit was issued by the Illinois Environmental Protection Agency (Agency) on October 13, 2000, to the Naperville Park District (Naperville) for its trap shooting facility located at 735 S. West Street, Naperville, Dupage County, Illinois. On November 2, 2000, the Board accepted this matter for hearing.

On November 29, 2000, the petitioner filed a motion for summary judgment. On December 15, 2000, Naperville filed a response to the motion and on December 22, 2000, the Agency filed a response. For the reasons discussed below the Board denies the motion for summary judgment and sends this matter to hearing consistent with this order.¹

BACKGROUND

The facility at issue in this proceeding is known as Naperville Sportsman’s Park (Sportsman’s Park) and consists of a 27-acre parcel in Naperville, Illinois. Resp. at 2. A trap shooting range consisting of three shooting stations is located at the facility. *Id.* Sportsman’s Park also includes two small water bodies connected by a stream or channel, at least 9.9 acres of wetlands, and other wooded areas. Memo. at 4; R. at 1252, 1256, 1263, 1304, 1646-77. The shooting stations will be used to fire at clay targets hurled over a portion of the wetlands and toward the stream and the two waterbodies. Memo. at 4; R at 0010, 1205, 1225, 1397, 1646.

¹ The motion for summary judgment filed by petitioner will be cited as “Mot. at ___” and the memorandum of law filed in support will be cited as “Memo. at ___”. The Agency’s response will be cited as “Ag. Resp. at ___” and Naperville’s response will be cited as “Resp. at ___”. The Agency’s record will be cited as “R. at ___”.

In March of 1998, petitioner filed a lawsuit in the United States District Court for the Northern District of Illinois claiming that Naperville violated the Clean Water Act (33 U.S.C. §1251 *et seq.*) by operating without an NPDES permit. See Stone v. Naperville Park District 38 F. Supp. 2d 651 (U.S. Dist. 1999). In August 1998, Naperville applied for an NPDES permit. Resp. at 3. The U. S. District Court found that Naperville was in violation of the Clean Water Act and enjoined Naperville from resuming trap shooting activities until a permit was issued. Stone v. Naperville Park District 38 F. Supp. 2d 651, (U.S. Dist. 1999).

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

For the purposes of the motions pending before the Board, therefore, the Board must construe the pleadings, depositions, and affidavits strictly against the petitioner on its motion for summary judgment.

ISSUES

The issue, as presented by petitioner in its motion, is whether the permit as issued violates the Board’s rules at 35 Ill. Adm. Code 302.203 and 304.106 and if so must the permit be denied. Section 302.203 provides that:

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algae growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

Section 304.106 provides:

In addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels.

The petitioner also presents two additional issues to the Board. First, petitioner is asking the Board to sanction the Agency for issuing the permit by ordering the Agency “to reimburse

Mr. Stone for all of his expenses, including legal fees, incurred in proceeding before the Board and the Agency.” Mot. at 6; Memo. at 15. Second, the petitioner asks the Board to “order the Agency to proceed with its non-discretionary statutory obligations” under Section 31 of the Act (415 ILCS 5/31 (1998)) and enforce the Act by requiring remediation of the site. Mot. at 6.

ARGUMENTS

The Board will first put forth the parties’ arguments regarding whether there are genuine issues of material facts and whether the permit as issued violates the Board’s rules at 35 Ill. Adm. Code 302.203 and 304.106. The Board will then summarize the arguments of the petitioner and the Agency’s responses on the issue of imposing sanctions and the issue of ordering enforcement of the Act and the Board’s regulations.

Whether There Are Genuine Issues of Material Facts and Whether The Permit As Issued Violates the Board’s rules at 35 Ill. Adm. Code 302.203 and 304.106

Petitioner argues that there is no factual dispute that the steel shot, clay targets, and shotgun shell waddings will settle on the bottom of the stream and the wetlands. Mot. at 2 and Memo. at 1. The petitioner maintains that such discharges would violate the Board’ rules at 35 Ill. Adm. Code 304.106 and 302.203, because the Board “strictly prohibits the deposition of bottom deposits or settleable solids.” Memo. at 2 and 8. Petitioner also maintains that “it is the duty of the Illinois EPA to deny a permit application where the proposed discharges would violate the Act or the Board’s regulations. Memo. at 2. Therefore, petitioner asserts that the Board should find as a matter of law that the permit will violate the Act and the Board’s regulations and the permit was improperly issued. Memo. at 15-16.

The petitioner points to two cases in support of his argument, the City of East Moline v. Illinois Environmental Protection Agency (November 15, 1989), PCB 87-127 and Illinois Environmental Protection Agency v. Commans, et al. (August 9, 1979), PCB 77-60. According to the petitioner, in Commans, the Board required that pieces of broken concrete and asphalt be removed from the side of a creek where they had been deposited. Memo. at 8. The petitioner summarizes East Moline and indicates that the Board denied a variance because the sludge deposits were violations of Section 302.203 and 304.106. Memo. at 8.

The petitioner also argues that the Agency acted improperly by only considering whether the permit would violate the water quality standards. Memo. at 11. Petitioner states that the Agency only considered the effect that the proposed discharge would have on the quality of the water column. *Id.* Petitioner asserts that the Agency “apparently concluded that it had the discretion to ignore governing laws and regulations” and the Agency was wrong to ignore Section 302.203 and Part 304 in its entirety. Memo. at 11-12.

Both the Agency and Naperville disagree that there are no genuine issues of fact to be decided. Both respondents point to facts which are in dispute. Specifically, Naperville maintains that “petitioner knows the targets never reach any water body at the Sportsman’s Park, and the permit requires the usage of non-toxic targets in any event.” Resp. at 4. Further Naperville

asserts that the wadding is inert cardboard or plastic material that never reaches any water body. Memo. at 4-5. Also Naperville maintains that both the shot and targets land in areas well short of the channel and are susceptible to regular removal and a plan for such removal is a requirement of the permit. Memo. at 5.

Naperville argues that petitioner has failed to offer any evidence of environmental impacts that would result from the shooting range operation. Resp. at 5. Naperville asserts that the permit is environmentally sound and the petitioner has failed to offer any evidence that the portion of steel shot that enters any wetland area or water body will actually cause environmental harm. Memo. at 8. Naperville also argues that the literal interpretation of Section 302.203 and 304.106 urged by petitioner would lead to an absurd result and such a literal interpretation would prevent the Agency from issuing almost any NPDES permit. Resp. at 6. Naperville refers to the Trepanier v. Speedway Wrecking (January 6, 2000), PCB 97-50 where the Board stated that environmental requirements must be given a reasonable interpretation. Resp. at 6-7, citing Trepanier at 9.

The Agency, in its response, lists several issues of fact which still exist. Those facts are: “how much steel shot, clay targets, and shell waddings will be discharged; where these materials will land; what impact on the water column and sediments will result; and how the permit was designed to ensure that no violation of the Environmental Protection Act will result from the resumption of shooting at the Sportsman’s Park.” Ag. Resp. at 3. Because the issues of fact have not been resolved, the Agency argues that summary judgment is not appropriate at this time and the motion must be denied. Ag. Resp. at 4.

The Agency also argues that the discharge of steel shot is not an effluent under Section 304.106. Ag. Resp. at 6. Specifically, the Agency maintains that “effluent” is defined to include wastewater and wastewater means industrial waste. Thus, according to the Agency the discharge of steel shot is not an effluent.

The Agency also maintains that the permit was not issued in violation of Section 302.203. The Agency argues that the literal interpretation urged by the petitioner is too narrow. Ag. Resp. at 8-9. The Agency points out that the Board’s rules contain a limit for total suspended solids at Section 304.124 and the Board recently granted an adjusted standard addressing solids in a discharge. Ag. Resp. at 9, citing Illinois American Water Company’s Alton Public Water Supply Replacement Facility Discharge to the Mississippi River for an Adjusted Standard from 35 Ill. Adm. Code 302.203, 304.106, and 304.124 (September 7, 2000), AS 99-6. Based on the facts in this case, the Agency argues that the permit would not violate Section 302.203. Ag. Resp. at 11.

Whether the Board Should Order the Agency to Pay Sanctions and to Enforce the Act and the Board’s Regulations Under Section 31 of the Act

Petitioner argues that there is no factual dispute that Naperville violated the Act, the Board’s regulations, and the Clean Water Act by the past practice of discharging lead without a permit. Memo. at 12, citing Stone v. Naperville Park District 38 F. Supp. 2d 651, (U.S. Dist. 1999). Because of these discharges, the petitioner argues that the site is heavily contaminated

with lead shot and toxic containing targets and fragments. Memo. at 12. Petitioner asserts that the Agency's proposal to allow mixture of these contaminants with stormwater and discharge to the Dupage River shows a disregard for the Agency's "non-discretionary statutory obligation to pursue legal remedies" requiring removal of the contamination. Memo. at 13. Therefore, petitioner asks the Board to order the Agency to proceed with the Agency's statutory obligations under Section 31 of the Act and enforce against Naperville. Memo. at 13-14.

Petitioner also argues that the Agency's position is "patently *ultra vires*" and the Board should sanction the Agency's for its actions. Petitioner requests that the Board order the Agency to reimburse petitioner for "all of his expenses" incurred in the proceedings before the Board and the Agency concerning this NPDES permit. Petitioner asks that such a reimbursement include legal fees. Memo. at 15. Petitioner asserts that the Board has this authority under "Rule 137" and the Board should exercise this authority. Rule 137 appears to be a reference to Supreme Court Rule 137. Supreme Court Rule 137 requires all pleadings to be signed. A signed pleading "constitutes a certificate that" to the best of the attorney's "knowledge, information, and belief formed after reasonable inquiry" the pleading is "well grounded in fact and is warranted by existing law" or there is a good-faith argument that a change in existing law is possible. S. Ct. Rule 137.

The Agency argues that the Board should deny the request for sanctions. Ag. Resp. at 13-14. The Agency points out that "Rule 137" does not apply to the Board's proceedings and points to the Board's procedural rules (both those effective prior to January 1, 2001, and those effective as of January 1, 2001), for support. The Agency also argues that the Board may not order the Agency to commence enforcement proceedings against the applicant as a condition of allowing the temporary discharge of contaminated stormwater. Ag. Resp. at 16. The Agency argues that reading the language of Section 31 of the Act as non-discretionary would bring the Agency to a halt. Ag. Resp. at 17. Further, the Board and the courts have consistently held that the Agency may not substitute permit denial for enforcement and a permit is not a license to pollute. Ag. Resp. at 17.

DISCUSSION

Whether There Are Genuine Issues of Material Facts and Whether The Permit As Issued Violates the Board's rules at 35 Ill. Adm. Code 302.203 and 304.106

The threshold issue in determining whether a motion for summary judgment may issue is whether there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The Board finds that there are still factual issues which must be further developed at hearing. The Board is persuaded by the Agency list of issues as well as conflicting factual statements in the pleadings by the parties. Therefore, the Board denies the motion for summary judgment and directs that this matter proceed to hearing.

Whether the Board Should Order the Agency to Pay Sanctions and to Enforce the Act and the Board's Regulations Under Section 31 of the Act

The Board will also address the requests by petitioner that the Board sanction the Agency and order the Agency to proceed under Section 31 of the Act. As the Agency accurately points out, Rule 137 does not apply to Board proceedings and the Board has its own rules on sanctions. The Board will sanction a party for failure to comply with a Board or hearing officer order. See 35 Ill. Adm. Code 800. The Agency has not done so in this proceeding. Also the Board does not have authority to order the Agency to pay attorney fees as a sanction. See ESG Watts v. Pollution Control Board, 286 Ill.App.3d 325; 676 N.E. 2d 299 (3rd Dist. 1997). Therefore, the Board denies the request for sanctions.

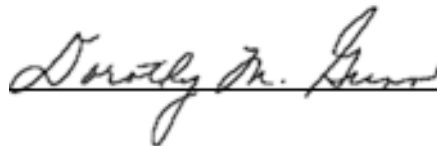
The Board has carefully considered petitioner's request that the Board order the Agency to proceed under Section 31 of the Act. As the Agency correctly points out, the Board and the courts have consistently held that a permit denial may not be a substitute for an enforcement action. The Board finds nothing in this record, or the arguments put forth by petitioner, which would persuade the Board to introduce an enforcement condition in this permit appeal. Further, whether or not to prosecute a violation of the Act or Board regulations is left to the Agency, the Attorney General, State's Attorney or private citizens. 415 ILCS 5/31(b) and (d) (1998). The Board will not order the Agency to proceed under Section 31 of the Act in this proceeding. Therefore that request is also denied.

CONCLUSION

The Board finds that there are genuine issues as to material facts which remain and therefore summary judgment is not appropriate. The Board denies the motion for summary judgment. The Board also denies the petitioner's requests for sanctions and the request to order the Agency to enforce against Naperville under Section 31 of Act. 415 ILCS 5/31 (1998). This matter shall proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of January 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board